No. 97-1485

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In The

Supreme Court of the United States

October Term, 1997

PHILIP COATES, DIRECTOR OF THE MASSACHUSETTS DIVISION OF MARINE FISHERIES, ET AL.,

Petitioners,

v.

RICHARD MAX STRAHAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

AMICI CURIAE BRIEF OF THE STATES OF CALIFORNIA, ALASKA, ARIZONA, GEORGIA, IDAHO, INDIANA, KANSAS, MAINE, MARYLAND, MISSISSIPPI, NEBRASKA, NEW HAMPSHIRE, NORTH CAROLINA, OHIO, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, AND THE GOVERNMENT OF GUAM IN SUPPORT OF THE PETITION FOR CERTIORARI

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
RICHARD M. FRANK
Senior Assistant Attorney General
Counsel of Record
LINUS MASOUREDIS
Deputy Attorney General
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-8178
Fax: (916) 327-2319
Counsel for Amicus State of California

[Additional Counsel Listed On Inside Front Cover]

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OR CALL COLLECT (402) 342-2831

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Bruce M. Botelho
Attorney General of
the State of Alaska

Grant Woods
Attorney General of
the State of Arizona

Thurbert E. Baker
Attorney General of
the State of Georgia

Alan G. Lance
Attorney General of
the State of Idaho

Jeffrey A. Modisett
Attorney General of
the State of Indiana

Carla J. Stovall
Attorney General of
the State of Kansas

Andrew Ketterer
Attorney General of
the State of Maine

J. Joseph Curran Jr.
Attorney General of
the State of Maryland

Mike Moore
Attorney General of
the State of Mississippi

Don Stenberg
Attorney General of
the State of Nebraska

Philip T. McLaughlin
Attorney General
of the State of
New Hampshire

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Attorney General of
the State of North Carolina

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the State of Ohio

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the State of South Dakota

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Attorney General of
the State of Tennessee

Jan Graham
Attorney General of
the State of Utah

Mark L. Earley
Attorney General
of the Commonwealth
of Virginia

Robert Kono
Acting Attorney General of
the Government of Guam

QUESTIONS PRESENTED

1. Whether a federal court decree requiring a State to enact and enforce remedial wildlife protection measures to implement the federal Endangered Species Act ("ESA"), where federal officials specifically charged with implementing the ESA have themselves declined to enact such measures, violates the Tenth Amendment to the U.S. Constitution and related principles of federalism and intergovernmental comity.

2. Whether Massachusetts proximately "caused" the take of endangered whales, for purposes of the ESA, by issuing fishing permits to private fishermen whose fishing activities may result in entanglement of whales in their nets where: (a) Massachusetts does not itself conduct any fishing that resulted in the take of whales; (b) Massachusetts law expressly prohibits the take of any endangered whales; (c) Massachusetts regulates fishing gear to minimize the risk of any take of whales; and (d) the Federal Government could have, but declined to, adopt more stringent fishing restrictions under the ESA and the Marine Mammal Protection Act that could have further reduced or completely eliminated the risk of an illegal take of whales.

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE PETITION 4

A. The Ruling Below Directly Conflicts With Recent Decisions of This Court Invoking Federalism Principles to Bar the Federal Government From Conscripting State Officers and Processes to Carry Out Federal Programs and Objectives..... 5

B. The Court Should Grant Review Because Massachusetts' Regulation of Fishermen Does Not Make Massachusetts the "Cause" of Whale "Takes" by Third Parties Under the Endangered Species Act 13

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Arizonans for Official English v. Arizona, ___ U.S. ___, 117 S.Ct. 1055 (1997) 6, 12

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) 4, 13, 14, 15

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 10

City of Boerne v. Flores, ___ U.S. ___, 117 S.Ct. 2157 (1997) 9, 12

Coalition for Clean Air, Inc. v. South Coast Air Quality Management Dist., et al., U.S.D.C., C.D. Cal. No. CV 97-6916 2

Edelman v. Jordan, 415 U.S. 651 (1974) 5

Ex parte Young, 209 U.S. 123 (1908) 5

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 10

Gregory v. Ashcroft, 501 U.S. 452 (1991) 12

Hines v. Davidowitz, 312 U.S. 52 (1941) 11

Idaho v. Coeur d'Alene Tribe of Idaho, ___ U.S. ___, 117 S.Ct. 2028 (1997) 5

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 16

New State Ice Co. v. Liebermann, 285 U.S. 262 (1932) (Brandeis, J., dissenting) 9, 10

New York v. United States, 505 U.S. 144 (1992) 5, 6, 7, 9, 12

Palila v. Hawaii Dept. of Land and Natural Resources ("Palila"), 852 F.2d 1106 (9th Cir. 1988) 14, 15

TABLE OF AUTHORITIES – Continued

Page

Printz v. United States, ___ U.S. ___, 117 S.Ct. 2365 (1997) 5, 6, 9, 12

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 10

Seattle Audubon Society v. Moseley, 80 F.3d 1401 (9th Cir. 1996) 15

Seminole Tribe of Florida v. Florida, ___ U.S. ___, 116 S.Ct. 1114 (1996) 5

Shaw v. Delta Airlines, Inc., 462 U.S. 85 (1983) 10

Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976) 16

CONSTITUTIONAL PROVISIONS

Tenth Amendment 4, 5, 6, 10, 11, 12

Eleventh Amendment 5

STATUTES

16 U.S.C.

§ 1361 3

§ 1371(a)(5)(E) 18

§ 1387 18

§ 1421h 3

§ 1531 3

§ 1531(c)(2) 8

§ 1533(f) 17

§ 1535 8

§ 1536 17

TABLE OF AUTHORITIES – Continued

Page

§ 1536(a)(1) 17

§ 1536(a)(2) 17

§ 1536(a)(4) 17

§ 1536(b) 17

§ 1540(f) 3

§ 1544 3

42 U.S.C.
§ 7401 ..... 2, 7

50 Code of Federal Regulations
§ 402.02 17

California Fish & Game Code
§ 2050 8

COURT RULES

Supreme Court Rule
10 4

37.4 1

OTHER AUTHORITIES

Prosser and Keeton on the Law of Torts, § 41, p. 266 (5th ed. 1984) 16

R. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311 (1992) 2

S. Breyer, *Breaking the Vicious Circle: Towards Effective Risk Regulation* (Harvard 1993) 19

T. Davis, "Expect Suits If Pygmy Owl Habitat Hurt," *Ariz. Daily Sun*, (Nov. 22, 1997) 2

AMICI CURIAE BRIEF

The States of California, Alaska, Arizona, Georgia, Idaho, Indiana, Kansas, Maine, Maryland, Mississippi, Nebraska, New Hampshire, North Carolina, Ohio, South Dakota, Tennessee, Utah, Virginia, and the Government of Guam, respectfully file this brief *amici curiae*, pursuant to Supreme Court Rule 37.4. The brief is submitted in support of the petition for certiorari filed in this case by the Commonwealth of Massachusetts.

INTEREST OF *AMICI CURIAE*

California and its sister states represent sovereign entities in our federal system. Each of the *amici* States has enacted its own set of regulatory programs, under its police power authority, to protect the health, safety and welfare of its citizens. Except to the very limited extent they are preempted by the federal government under the Supremacy Clause of the U.S. Constitution, these state regulatory programs constitute distinct governmental program, enacted and administered by the sovereign States.

The decision below threatens the very nature of this system of dual sovereignty. Plaintiffs below, unsuccessful in vindicating their policy views before Congress or federal regulators, instead brought a citizen suit in federal court. There they convinced a district judge – and ultimately the Court of Appeals – that the federal judiciary has the power to compel state officials to take affirmative steps to implement federal law that federal officials have deemed unnecessary, unwise or both. The implications of that ruling for *amici* States are both enormous and destructive. Left unreviewed, the decision below will no doubt encourage private citizens and federal officials alike to force States to carry out and implement federal programs that the federal government is itself unprepared to pursue.

Such a transfer of government functions, political accountability and attendant costs is both unconstitutional and unsound public policy.

The adverse effects of the decision below are already being felt around the nation. In Arizona, for example, federal wildlife officials – relying on the decision below – have threatened to hold State and local officials responsible for an illegal "take" of pygmy owls (a listed species under the ESA) if the state and local officials allow rezoning or issue building permits to landowners who then modify habitats suitable for the pygmy owl. (T. Davis, "Expect Suits If Pygmy Owl Habitat Hurt," *Ariz. Daily Sun*, p. 1B (Nov. 22, 1997).)

In the Pacific Northwest, federally-adopted guidelines under the ESA have been used to compel State officials to limit timber harvesting on private lands when the latter administer state permitting processes. Failure to do so, it is asserted, will render the States liable under the ESA on a complicity theory with private actors. Again, the net result is that States have been conscripted as the regulatory agencies of the federal government. (R. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1371 (1992).)

And in California, private parties have sued State and regional officials in federal court under the federal Clean Air Act (42 U.S.C. § 7401 et seq.) to compel, *inter alia*, the State to implement ozone emission standards advocated by those plaintiffs. (*Coalition for Clean Air, Inc. v. South Coast Air Quality Management Dist., et al.*, U.S.D.C., C.D. Cal. No. CV 97-6916.)

The potential, deleterious consequences of the decision below are by no means limited to the field of environmental regulation. The same reasoning employed by the district court and the Court of Appeals may be invoked to justify a similar shifting of regulatory responsibilities from the federal government to the States in such diverse subject areas as welfare, health care and law

enforcement. The lower courts' refusal to recognize established principles of federalism and intergovernmental comity, coupled with their strained application of causation principles to interpret federal remedial legislation, thus has nationwide ramifications, and threatens a broad array of regulatory programs administered by the States.

STATEMENT OF THE CASE

Amici States agree with Petitioner Massachusetts' Statement of the Case, and adopt it as if set forth in full herein. *Amici* stress only the following, specific points:

In this case, Northern Right whales, an animal species listed as endangered under the ESA (16 U.S.C. §§ 1531-1544), were deemed "taken" within the meaning of the ESA because they became entangled in the gillnets and lobster pot lines of private fishermen. The courts below found Massachusetts culpable for this whale "take" because it issued fishing permits to fishermen, and had adopted state regulations on the use of fishing gear. Massachusetts itself did not conduct any of the fishing that resulted in the take of whales. (Appendix to Petition ("Pet. App.") B-39.) Nor did Massachusetts *require* fishermen who received permits to fish. By issuing fishing permits, neither did Massachusetts purport to authorize any take of listed whales. To the contrary, Massachusetts law expressly *prohibits* the taking of any federally-listed species, including Northern Right whales. (Petition ("Pet.") 12.) Moreover, the undisputed purpose of Massachusetts' fishing gear regulations is to *minimize* the risk of whale entanglements and takes caused by fishermen.

Significantly, the federal government, through the National Marine Fisheries Service ("NMFS"), has broad authority under the Marine Mammal Protection Act ("MMPA," 16 U.S.C. §§ 1361-1421h) and the ESA (16 U.S.C. § 1540(f)) to impose additional or more stringent fishing gear restrictions than those of Massachusetts, or to ban fishing altogether to avoid any take of whales. (See Pet. App. A-5; A-13 to A-15; B-23 to B-26.) However,

NMFS has made a policy judgment *not* to adopt more stringent whale protection measures under the regulatory power conferred upon it by those two federal statutes. (See A-18, n.3; A-19 (noting that NMFS had declined to ban gillnet and lobster pot fishing in Cape Cod Bay).) Indeed, apparently it was only when plaintiff was unsuccessful in convincing *NMFS* to adopt the regulatory measures he advocates that plaintiff found it necessary to initiate the present litigation against Massachusetts to accomplish that objective indirectly.

REASONS FOR GRANTING THE PETITION

There are several reasons why certiorari should be granted under the established standards articulated in Supreme Court Rule 10. First, the decision below directly conflicts with recent decisions of this Court regarding the scope of the Tenth Amendment and related principles of federalism. Second, the Court of Appeals below seriously misconstrued principles of causation applicable under the ESA, and did so in a manner which is fundamentally inconsistent with the Court's recent decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); the Court should squarely resolve the ESA causation question now. Finally, the decision below, if left unreviewed, will have serious, negative consequences for all of the States – particularly as they relate to citizen suits brought against state officials and to questions of intergovernmental comity between the States and the federal government. These points are developed below, with particular reference to the constitutional and statutory issues presented in Massachusetts' petition for certiorari.

A. The Ruling Below Directly Conflicts With Recent Decisions of This Court Invoking Federalism Principles to Bar the Federal Government From Conscripting State Officers and Processes to Carry Out Federal Programs and Objectives.

The petition in this case calls upon the Court to once again "discer[n] the core of sovereignty retained by the States under the Tenth Amendment" and related principles of federalism. (*New York v. United States*, 505 U.S. 144, 159 (1992).) By compelling Massachusetts to take affirmative and unprecedented steps to implement the ESA, the tribunals below have ignored this Court's repeated admonition that "[t]he federal government may not compel the States to enact or administer a federal regulatory program." (*New York, supra*, 505 U.S. at 188; *Printz v. United States*, ___ U.S. ___, 117 S.Ct. 2365, 2383 (1997).) This conflict, and the grave consequences it portends for all the States, warrants the Court's grant of review.[1]

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[1] The extraordinary relief ordered by the district court similarly would appear to violate the Eleventh Amendment. States are generally immune from unconsented suits in the federal courts under the Eleventh Amendment, subject to the narrow exception to Eleventh Amendment immunity afforded under *Ex parte Young*, 209 U.S. 123 (1908). The extraordinary, open-ended and affirmative mandate imposed on Massachusetts state officials in this case appears to exceed by a substantial degree the proper scope of *Ex parte Young*. See *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996); *Idaho v. Coeur d'Alene Tribe of Idaho*, ___ U.S. ___, 117 S.Ct. 2028 (1997).

While the issue of Massachusetts' Eleventh Amendment immunity from suit was actively contested and adjudicated below, the question is not squarely presented in the petition for certiorari. Nonetheless, a State's immunity from suit under the Eleventh Amendment is jurisdictional, and may be raised at any stage of the litigation. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

1. The First Circuit acknowledged, as it must, that "the commands of the Tenth Amendment apply to all branches of the federal government, including the federal courts." (Pet. App. at A-31.) This, of course, applies with equal force to the related principles of federalism that are implicated in this case. (See discussion at pp. 12-13, *infra*.) Similarly, the district court's efforts to justify its imposition of federal regulatory duties on Massachusetts as not requiring the Commonwealth "to modify its legislative process" are patently unavailing in light of *Printz, supra*. There the Court made it abundantly clear that it is no less offensive to federalism principles to commandeer a State's *regulatory* program than it is to dragoon its legislative process. (117 S.Ct. 2365, 2380-2381, 2384 ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program").) The lower courts' decree that Massachusetts adopt measures to enforce a federal regulatory program that federal regulators themselves declined to enact is at least as noxious to federalism principles as the statutory mandates struck down in *New York* and *Printz*. Such mandates are "fundamentally incompatible with our constitutional system of dual sovereignty." (*Printz, supra*, 117 S.Ct. at 2384.)

2. The affirmative mandate the district court imposed on Massachusetts in this case is startling in scope. This is perhaps best understood by comparing the terms of the lower court's mandatory injunction to regulatory measures that federal agencies are themselves expressly empowered to enact under the ESA.

The Court, similarly, may raise the jurisdictional issue *sua sponte*. *Arizonans for Official English v. Arizona*, ___ U.S. ___, 117 S.Ct. 1055, 1071 (1997).

While federal agencies only need ensure that their permitting does not cause jeopardy to the aggregate species population, the courts below directed Massachusetts to ensure that any fishing permit it issues does not create a risk of a take of a *single member of a listed species*. (See Pet. App. A-22.) While federal permit agencies need only consult with federal wildlife agencies under section 7 of the ESA, the district court ordered Massachusetts to set up a court-supervised advisory committee and engage in substantive discussions with the *private plaintiff* regarding changes to Massachusetts' state regulatory program; the district court will then review those changes to determine their adequacy in ensuring that program's legality under the ESA. (See Pet. App. A-3 (Massachusetts must convene an Endangered Whale Working Group and "engage in substantive discussions with the Plaintiff"); A-29 (Massachusetts to "form a working group and engage in substantive discussions toward rectifying [Massachusetts'] statutory violation with working group members whose membership is directed ultimately by the district court").)

There is simply no statutory basis in the ESA for such a "shadow" section 7 system for State permit programs, and no indication that Congress intended such intrusive supervision of the States' permit programs at the hands of private citizens. The lower courts' imposition on Massachusetts of these ad hoc, affirmative mandates finds no support in the ESA and violates basic constitutional precepts of intergovernmental comity.

3. As this Court aptly noted in *New York*, Congress has enacted numerous environmental statutes that expressly contemplate a shared federal-state enforcement role. (505 U.S. at 167-168.) These include the Clean Air Act, Clean Water Act, the Resource Conservation and Recovery Act, and the Coastal Zone Management Act. Those statutes reflect Congress' acknowledged power "to offer States

the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." (*Id.* at 167.)

The ESA, in contrast, is federal environmental legislation of a different kind. It is a so-called federal "lead" statute, in which enforcement authority is expressly imposed upon *federal* agencies: principally the U.S. Fish and Wildlife Service, (NMFS), and the U.S. Department of Justice. (See 16 U.S.C. § 1540.) The States, on the other hand, are not required to enforce the ESA.[2]

This is not to say that States have no role to play in exercising their independent police power authority to protect endangered plant and animal species. To the contrary, most States have enacted their own endangered species laws, which are designed to accomplish parallel objectives to the ESA, albeit through a distinct mix of State-crafted strategies and requirements. (See, e.g., Calif. Fish & Game Code § 2050 et seq. (California Endangered Species Act).)

Under these circumstances, the parameters and implications of the district court decree in this case are particularly offensive to federalism principles. The private plaintiff, having failed to convince the NMFS through the political process to enact the restrictions on commercial fishing he advocates, successfully importuned a federal court to impose those restrictions indirectly – by commandeering Massachusetts officials to modify their state regulatory program so as to implement plaintiff's objectives under the ESA. Rather than be

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[2] Congress did envision a role for States under the ESA, albeit a non-regulatory one. See, e.g., 16 U.S.C. § 1535, directing federal regulators to "cooperate to the maximum extent practicable with the States" in carrying out the ESA's objectives. See also, 16 U.S.C. § 1531(c)(2).

allowed to administer its own wildlife preservation program, Massachusetts has been forced by federal court decree to devise the very type of ad hoc measures that federal ESA regulators themselves previously rejected on policy grounds.

Such a result directly contravenes this Court's federalism jurisprudence. The decision below "purports to draft state law enforcement officers to participate . . . in the administration of a federally-enacted program." (*Printz, supra,* 117 S.Ct. at 2369.) That, in turn, "contradicts vital principles necessary to maintain . . . the federal balance." (*City of Boerne v. Flores,* ___ U.S. ___, 117 S.Ct. 2157, 2171 (1997).)

Quite simply, the lower court decree "'commandeer[s]' state governments into the service of federal regulatory purposes"; it is for that reason "inconsistent with the Constitution's division of authority between federal and state governments." (*New York, supra,* 505 U.S. at 175.)

4. Ironically, Massachusetts could have avoided liability under the ESA by simply declining to regulate commercial fishing at all. The district court expressly noted this anomalous result in its decision below. (Pet. App. at B-41-42.) The Commonwealth has, in effect, been penalized under the ESA for having taken affirmative, positive steps to protect wildlife resources within its boundaries. Simply stated, as a result of the decision below Massachusetts is in a worse legal position for having implemented a salutary state natural resource protection program than it would have been had the Commonwealth not exercised its police powers in this fashion at all. This contradicts established notions of cooperative federalism, and discourages States from acting as the "social laboratories" that Justice Brandeis urged them to be nearly 70 years ago. (*New State Ice Co. v.*

Liebermann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

5. The Court of Appeals grounded its ruling that no Tenth Amendment violation had occurred in major part on the startling holding that Massachusetts' benign program of fishing regulation was *preempted* by the ESA. (Pet. App. at A-33.) The Court of Appeals reasoned that by including States as parties subject to the ESA's prohibitions, Congress implicitly intended to preempt any action of a State inconsistent with and in violation of the ESA. (*Ibid.*) This construction of federal law could prevent States and local governments from adopting *any* regulation that authorizes third party activities that might conceivably cause harm to listed species, even if the State or local regulation is wholly benign in its objectives.

The First Circuit's reliance on preemption theory in this Tenth Amendment context does violence to the Court's precedents. Judicial consideration of the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by [federal law] unless that [is] the clear and manifest purpose of Congress." (*Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).) State law may be preempted if Congress has explicitly mandated the preemption of state law (*Shaw v. Delta Airlines, Inc.*, 462 U.S. 85, 95-100 (1983)), or if Congress has indicated an intent to "occupy the field of regulation," thereby displacing state laws on the same subject. (*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).) In the absence of express language or congressional intent to occupy the field, state law may be preempted to the extent the latter actually conflicts with federal law, i.e., when "compliance with both federal and state regulations is a physical impossibility" (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); or when state law "stands as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).)

It is apparent from the language and structure of the ESA that Congress recognized and accommodated the continued operation of State laws regulating wildlife. Congress expressed no intention through the ESA of occupying the field of such regulations. To the contrary, the ESA only preempts state law that directly conflicts with the ESA. (16 U.S.C. § 1535(f).) A finding that Massachusetts' fishing regulations are preempted because they do not go far enough is simply inappropriate, because State and federal laws do not conflict, and Massachusetts' law is no obstacle to the accomplishment of federal objectives. Regulated persons can and must comply with both state and federal law on the subject.

Core principles of federalism dictate that courts proceed very cautiously in implying preemption of state regulations that relate to fundamental aspects of state sovereignty. Moreover, the Supremacy Clause does not lead to any requirement that States adopt, endorse or legislate to implement a federal regulatory program.

The courts below turned these basic principles on their head. Instead of recognizing that a State's exercise of its basic police power authority does not offend established Supremacy Clause principles, they grounded their rejection of Massachusetts' Tenth Amendment argument in principal part on the baseless conclusion that its benign regulatory program was preempted by federal standards that the United States had itself declined to adopt. This was fundamental error. As this Court has aptly noted in similar circumstances, "the Supremacy Clause merely brings us back to the question . . . whether laws conscripting state officials violate state sovereignty

and are thus not in accord with the Constitution." (*Printz, supra,* 117 S.Ct. at 2379.)

Similarly, the lower courts' preemption ruling is directly tied to their flawed view of causation principles under the ESA, discussed in part (B), below. Simply stated, one key reason no preemption exists here is that Massachusetts did not cause an illegal take under the ESA.

6. Both the decision below and Massachusetts' petition focus their constitutional discussion on the Tenth Amendment. The Tenth Amendment, however, is not the only cornerstone of federalism. Nor is it the sole constitutional provision implicated in this case. (See *Printz, supra,* 117 S.Ct. at 2379 n.13 ("the Tenth Amendment is [not] the exclusive textual source of protection for principles of federalism").)

The Court has repeatedly stressed that our system of dual sovereignty is reflected in numerous constitutional provisions. (*Id.* at 2370, 2376, 2379 n.13; *City of Boerne v. Flores, supra,* 117 S.Ct. at 2171; *Arizonans for Official English v. Arizona,* ___ U.S. ___, 117 S.Ct. 1055, 1073-1075; *New York, supra,* 505 U.S. at 181-182; *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991).) This larger orbit of federalism principles is similarly contravened by the extraordinary dictates of the decisions below.

Just last Term, the Court counselled: "The Constitution contemplates that a State's government will represent and remain accountable to its own citizens." (*Printz, supra,* at 2377.) It is those broader constitutional precepts, and not simply the Tenth Amendment, that make "clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." (*Id.* at 2380.) The grave consequences of the lower courts' contrary conclusion, for both Massachusetts and its sister States, warrant the Court's grant of certiorari in this case.

B. The Court Should Grant Review Because Massachusetts' Regulation of Fishermen Does Not Make Massachusetts the "Cause" of Whale "Takes" by Third Parties Under the Endangered Species Act.

The Court of Appeals' wholesale disregard of this Court's federalism precedents is particularly unfortunate in light of the fact that the courts below need not have confronted the constitutional issues at all. This is because the lower courts similarly erred in interpreting the statutory mandates of the ESA as they affect Massachusetts. Had those courts properly applied this Court's recent decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon ("Sweet Home")*, 515 U.S. 687 (1995), it would never have been necessary to reach the constitutional question.

The Court should grant review to resolve continuing confusion among the lower courts over the proper causation standard for a "take" under the ESA. The Court also should grant review because of the highly intrusive impact of the decision below upon States as regulators of their citizens. Virtually every State licenses or issues permits for a wide range of private activities (like fishing, timber harvesting, water diversions, land grading, construction activities, etc.). These private activities inevitably pose some risk of a take of listed species under the ESA. Per the First Circuit's reasoning, every State now will be liable for any take resulting from those private activities simply because the State issued a license for that activity, and failed to ensure that the risk of any take would be zero. The fact that State law prohibits a take will be inadequate to discharge this ESA duty, as it was in Massachusetts' case. Massachusetts' petition for certiorari should be granted because it raises important issues in the administration of the ESA that have profound federalism implications.

1. The majority, concurring, and dissenting opinions in *Sweet Home, supra,* 515 U.S. 687, all agreed that the "take" prohibition in the ESA is subject to a proximate cause limitation.[3] The United States also took the position before this Court in *Sweet Home* that "principles of proximate causation" should be applied to address the issue of "intervening acts" by others in the factual chain of causation for a take. (See Reply Br. for Petitioners at 4, n.4 in No. 94-859 (1995).) Because *Sweet Home* was a purely facial challenge, there was no need to rule on any particular pattern of take "causation" in a specific set of circumstances. However, four Justices thought that the pattern of indirect and attenuated causation in *Palila v. Hawaii Dept. of Land and Natural Resources ("Palila"),* 852 F.2d 1106 (9th Cir. 1988), did not satisfy proximate cause requirements, and that the *Palila* case had been wrongly decided. (See 515 U.S. at 709, 713-714 (O'Connor, J., concurring); *id.* at 715-716 (Scalia, J., dissenting).) Yet some courts continue to view the *Palila* decision, with its "but

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[3] See 515 U.S. at 697, n.9 ("take" prohibition and the harm regulation "incorporate ordinary requirements of proximate causation"); *id.* at 700 n.13; *id.* at 709 (harm regulation "is limited by ordinary principles of proximate causation") (O'Connor, J., concurring); *id.* at 712-713 (no Congressional intent "to dispense with ordinary principles of proximate causation", and "private parties should be held liable [for a take] only if their habitat-modifying actions proximately cause death or injury to protected animals") (O'Connor, J., concurring); *id.* at 732-733 (the "take" prohibition contains "a requirement of proximate causation") (Scalia, J., dissenting). The members of the Court differed as to whether the "harm" regulation, in fact, incorporated such a proximate cause restriction: the majority and concurring Justices thought that it did (and, therefore, the regulation was valid), and the dissenting Justices thought that it did not (and, therefore, the regulation was invalid).

for" causation analysis, as a model. Indeed, the Ninth Circuit apparently believes that this Court *endorsed* the *Palila* causation standard in *Sweet Home*. (See *Seattle Audubon Society v. Moseley*, 80 F.3d 1401, 1405 (9th Cir. 1996) (stating that in *Sweet Home* "five Justices affirmed *Palila* in all respects").)

Here, the First Circuit erroneously used a "but for" standard rather than the proximate cause standard required by *Sweet Home*. (See Pet. App. A-15 (take prohibitions "apply to acts by third parties that allow or authorize acts that exact a taking and that, *but for* the permitting process, could not take place."); Pet. App. B-57 ("*In the absence of permitting*, no fish entanglement could occur.") (emphases added).) By granting review the Court can address proximate cause principles applicable under the ESA, an issue discussed but left unresolved in *Sweet Home*.

2. Under the proximate cause standard, fishermen were "intervening independent actor[s]" (Pet. App. A-17), who displaced Massachusetts as the "cause" of any take, contrary to the First Circuit's conclusion. The First Circuit said that while a State's licensing of cars should not make the State liable for a car owner's illegal use of the car, here, it is impossible to use gillnets and lobster pots "in the manner permitted by [Massachusetts] without risk of violating the ESA by exacting a take." *Id.* But Massachusetts does not require fishermen to fish; nor does it prevent fishermen from taking additional precautions (beyond those mandated by the State) to avoid any take. Consequently, fishermen are an intervening, independent cause of any take. They alone make decisions about whether, when and how to fish in light of the risk of take and the prohibition against take under both federal and Massachusetts law. There is no showing that plaintiff could not have brought suit against fishermen (either via

a class action or otherwise), and thereby sought relief against those who directly cause any take.[4] Therefore, fishermen are an independent, intervening cause of any take under ordinary proximate cause principles.

3. Even under a "but for" causation standard, Massachusetts is not the "cause" of any whale take. Under "but for" causation:

> "The defendant's conduct [i.e., Massachusetts' licensing of fishing] is a cause of the event [i.e., take of whales] if the event would not have occurred but for the conduct; *conversely*, the defendant's conduct is *not a cause* of the event, *if the event would have occurred without it.*" (W. Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 41, p. 266 (5th ed. 1984) (emphasis added).)

Thus, if a whale take would occur *regardless* of whether Massachusetts licenses fishermen and adopts protective fishing gear regulations, then, under hornbook law, Massachusetts' licensing is not a "but for" cause of any take. Federal law, of course, does not require Massachusetts to license and regulate fishing. If Massachusetts revoked all of its fishing gear regulation and chose not to license fishermen, that would not eliminate whale take; quite the contrary, it would undoubtedly *increase* whale take. Consequently, Massachusetts' licensing of fishermen and its regulation of fishing gear is not a "but for" cause of any take of whales by fishermen.

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[4] The status of fishermen as an independent, intervening cause would also seemingly raise the issue of whether the causation requirement for constitutional standing is satisfied or whether the alleged injury (take of whales) is traceable "to the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976).

This shows that the First Circuit was not imposing take liability because of Massachusetts' *affirmative* acts of licensing and regulating fishing gear (because without those things, more, not less take would have resulted). Instead, take liability is being imposed because Massachusetts did not regulate "enough" and ensure zero risk of take from third party activities. Causation in this case is based on alleged *omissions* or a failure to act, not on any *affirmative* acts of the State – which, of course, is why the remedy plaintiff seeks is *more* fishing regulation by Massachusetts, not less.

4. The First Circuit's causation theory is also inconsistent with the structure of the ESA. Section 7 of the ESA (16 U.S.C. § 1536) requires federal agencies that issue permits or licenses for private activities to avoid jeopardy to listed species (*id.*, § 1536(a)(2)); consult with federal wildlife agencies (*id.*, § 1536(a)(4)); and obtain biological opinions from the federal wildlife agency which may include incidental take authorization. (*Id.*, § 1536(b); see also 50 C.F.R. § 402.02 (definition of "action" to include federal permitting and licensing).) Significantly, these section 7 requirements apply only to *federal*, not State permitting programs. This is understandable given the greater species protection duties imposed upon the federal government in the ESA.[5]

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[5] For example, under the ESA, the federal government, but not a State, has the duty to adopt recovery plans under section 4(f) [16 U.S.C. § 1533(f)]; to conserve species under section 7(a)(1) [16 U.S.C. § 1536(a)(1)]; and to avoid jeopardy and the destruction of critical habitat under section 7(a)(2) [16 U.S.C. § 1536(a)(2)].

Similarly, the federal government, but not a State, has authority under the MMPA to adopt incidental take permits and authorizations, take reduction plans, emergency regulations, and a host of regulatory measures to protect whales. See MMPA,

The First Circuit has now created a de facto section 7 system for State permitting programs through its construction of the section 9 take prohibition. In operating its fishing permit program, Massachusetts now has to ensure, as a matter of federal law, that the activities of third party permittees will not create the risk of any take (which is akin to the section 7(a)(1) duty of federal permitting agencies to avoid jeopardy or the section 7(a)(1) duty of conservation). Massachusetts also is required to seek from federal wildlife agencies and obtain incidental take authorization to legalize Massachusetts' fishing permit program (which is arguably analogous to the section 7(a)(2) duty of federal permitting agencies to consult with federal wildlife agencies and obtain, pursuant to section 7(b)(4), incidental take authorization for jeopardy-causing activities). According to Massachusetts, NMFS itself shrank from the idea that the State, as a government regulator, must obtain incidental take authorization from NMFS to legalize the State's regulatory program under the ESA. (See Pet. 7, n.4 (noting that NMFS found Massachusetts' incidental take application "unnecessary and inappropriate").) This is understandable given that section 7 plainly applies only to federal, not State, permitting programs.

5. The First Circuit's "zero risk" standard against which the legality of Massachusetts' permitting program is to be measured is unprecedented in the administration of the ESA. Federal permitting is not subject to a "zero risk" standard under section 7 of the ESA. An insistence that remote actors ensure against any risk of a take would have socially undesirable and counterproductive results.

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section 118 [16 U.S.C. § 1387]; MMPA, section 101(a)(5)(E) [16 U.S.C. § 1371(a)(5)(E)].

For example, manufacturers of fishing gear could be liable for a take resulting from third party use of their nets simply because they allowed their product to enter the stream of commerce. If States are liable for a take based solely on their permitting function, some States might forego regulation entirely to avoid potential liability. The district court, in fact, noted that Massachusetts could do just that. (See Pet. App. B-42 ("If Defendants cease exercising control over the use of gillnets and lobster gear in Massachusetts waters, then they will not be held liable, under Section 9, for any subsequent harm caused by such nets.")) Thus, the expansive causation theory in this case creates an incentive for States *not* to regulate to protect whales. This, of course, leaves listed species worse off than before.

The First Circuit's decision gives States a stark choice: they must either reduce all risk to zero, or exit the field to avoid take liability; ameliorative steps that fail short of zero risk still will expose the State to ESA liability. (See Pet. App. A-22 (stating that "a single injury to one whale is a taking under the ESA" and that Massachusetts' "efforts to minimize such entanglements are *irrelevant*") (emphasis added).) The quest for zero risk and the imposition of liability upon distant and remote actors ends up being counterproductive of species protection. See generally S. Breyer, *Breaking the Vicious Circle: Towards Effective Risk Regulation* (Harvard 1993) (arguing that pursuit of zero risk may be counterproductive in generating other risks and misallocating resources). Because Congress did not intend such perverse species protection incentives, the Court should review and reverse the First Circuit's decision.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

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Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
RICHARD M. FRANK
Senior Assistant Attorney General
Counsel of Record
LINUS MASOUREDIS
Deputy Attorney General
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-8178
Fax: (916) 327-2319
Counsel for Amicus
State of California

[Additional Counsel Listed On Inside Front Cover]